LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 16 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 357

LOUIS S. SMITH, HERBERT E. CALLENDER, MARVA L. AMIS, LILY R. LEWIS, WILLIARD D. CRITTENDON, JOYCE L. SCHURIK,

Petitioners,

—v.—

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

CARL RACHLIN,
ALBERT X. BADER,
DAVID I. FOX,
Attorneys for Petitioners.

Of Counsel:
GEORGE SCHIFFER,
STEPHEN M. NAGLER,
MARVIN KARPATKIN,
FLOYD MCKISSICK,
ROBERT COLLINS,
NILS DOUGLAS,
LOLIS E. ELIE,
ERNEST FINNEY,
JOHN D. DUE.

BLANK

PAGE

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	5
Statement	6
Reasons for Granting the Writ	14
Conclusion	21

Table of Citations

Cases:

Brown v. Louisiana, 383 U. S. 131 (1966) 12, 17

Cox v. Louisiana, 379 U. S. 536, 85 S. Ct. 453 (1965) 17, 19

Edwards v. South Carolina, 372 U. S. 229 (1963) 17, 19

Handlin v. State, 16 N. J. L. 96 (1837) 17

Hughes v. City of East Orange, 29 N. J. L. J. 343 (1906) 17

Mullen v. State of New Jersey, 67 N. J. L. 451 (1902) 17

PAGE

Shuttlesworth v. Birmingham, 382 U. S. 87 (1965) 12

State of New Jersey v. Louis Smith, 46 N. J. 510, 118 A. 2d 147 (1966) 1, 2, 9, 11, 12, 13, 16, 17

Winters v. New York, 333 U. S. 507 (1948) 17

Constitutional Provisions and Statutes:

United States Constitution

First Amendment 5

Fourteenth Amendment 5

United States Statutes

18 U. S. C. §1257(3) 2

New Jersey Statutes

Chapter 2A:170-28 .....1, 3, 5, 6

Chapter 2A:170-29(2)(B) 2, 4, 6, 11

In the

Supreme Court of the United States

October Term, 1966

No. .....

Louis S. Smith, Herbert E. Callender, Marva L. Amis, Lily R. Lewis, Williard D. Crittendon, Joyce L. Schubik,

Petitioners,

—v.—

The State of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioners pray that a Writ of Certiorari issue to review the mandate on affirmance of the Supreme Court of the State of New Jersey entered in the above entitled action on March 21, 1966.

Citations to Opinions Below

The New Jersey Supreme Court affirmed the convictions of the defendants in an opinion which is reported, *sub nom. State of New Jersey* v. *Louis S. Smith,* at 46 N. J. 510, 118 A. 2d 147 (1966), a copy of which is attached to the Appendix-Record. The Mercer County Court, from which the appeal to the Supreme Court was taken, convicted Petitioner Callender of violating Chapter 2A:170-28

of the New Jersey Statutes (which prohibits noisy or disorderly conduct in certain places of public assembly) and convicted all of the Petitioners of violating Chapter 2A: 170-29 (2) (b) of the New Jersey Statutes which prohibits one from obstructing, molesting or interfering with another in a public place. The Mercer County Court heard the cases on trial *de novo* appeal from convictions of all petitioners on both charges by the Municipal Court of Trenton. The opinion of the Mercer County Court (Hon. J. Wilson Noden, Justice of the County Court), which is not officially reported, is printed as part of the Appendix, used as a record (62a-65a).* There was no opinion in the Municipal Court of Trenton. Appeal was taken to the Appellate Division but *sua sponte* the New Jersey Supreme Court heard and decided the case as above stated.

Jurisdiction

Jurisdiction of this Court is invoked under Section 1257 (3) of Title 18 of the United States Code. As plainly appears from the opinion of the New Jersey Supreme Court, reported at 46 N. J. 510, 118 A. 2d 147, Petitioners contended that under the United States Constitution rights had been violated and these contentions were adequately raised and preserved and were actually passed upon by the New Jersey Supreme Court.

---

* Numbers in parentheses unless otherwise indicated refer to pages of the Appendix used in the Supreme Court of New Jersey, prepared from the stenographic minutes of trial in the Mercer County Court, and stipulated as the record by all parties concerned.

Questions Presented

1. Whether Chapter 2A:170-28 of the New Jersey Statutes designed to protect places of quiet such as churches, libraries, schools and the like, as construed and applied in this case to remove from a controversial public hearing a peaceful person known to hold views opposed to the chairman is constitutional; or whether that statute, on its face applying to "quiet" assemblies becomes unconstitutionally vague and indefinite when applied to a knowingly controversial public meeting.

2. Whether a peaceable member of an audience at a controversial public hearing, known to hold views sympathetic to speakers at such meeting but opposed to those of the chairman, and who is ordered to leave by the chairman but chooses to remain peacefully in the auditorium, thus not obeying the direction of the chairman or the police to leave and is thereupon forcibly removed by the police, may constitutionally be convicted of violating Chapter 2A:170-28 of the New Jersey Statutes which defines as a "disorderly person" one who by "noisy or disorderly conduct disturbs or interferes with the quiet or good order of any place of assembly public or private, including schools, churches, libraries and reading rooms. . . ."

3. Whether a person improperly ordered to leave a controversial public meeting, who refuses to do so and is forcibly removed, may be constitutionally convicted under the said Chapter 2A:170-28.

4. Whether a person who has been removed by the police from a public auditorium and has been detained and placed

by them in the adjacent public corridor and remains there peacefully until removed by the police, may constitutionally be convicted of violating Chapter 2A:170-29 (2) (b) of the New Jersey Statutes, which defines as a "disorderly person" one who "interferes with any person lawfully therein".

5. Whether, after one member of the audience, behaving in the same peaceful but disputatious way as others present at a public hearing, has been forcibly removed by the police and detained by them in the adjacent public corridor, and several other persons who have been attending the said public meeting, sit down in the same corridor, adjacent to him, and remain there peaceably for a short period until removed by the police, may constitutionally be convicted of violating Chapter 2A:170-29 (2) (b) of the New Jersey Statutes, by obstructing or "interfering" with persons lawfully therein, when not more than one person, an employee of the Trenton Council, claims to have been "inconvenienced" and that person for one minute or less, when there is substantial testimony that others went in and out without difficulty.

6. Whether Chapter 2A:170-29 (2) (b) of the New Jersey Statutes on its face or as construed and applied in this case to persons sitting for a short time in a public building during hours when it is open to the public and where they have business, is constitutional; or whether it is unconstitutionally vague and indefinite because the New Jersey Supreme Court defines "obstruction" in a manner not in common use, and whether a conviction under such definition is a denial of due process.

Constitutional Provisions and Statutes Involved

United States Constitution
First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

New Jersey Statutes

Chapter 2A:170-28

Disturbing Assemblies

Any person who by noisy or disorderly conduct disturbs or interferes with the quiet or good order of any place of assembly, public or private, including schools, churches, libraries and reading rooms, is a disorderly person.

Chapter 2A:170-29 (2) (b)

Offensive Language: Molesting or Interfering With Persons

2. Any person who, in any place, public or private,

(b) Obstructs, molests, or interferes with any person lawfully therein . . . is a disorderly person.

Statement

Each of the Petitioners was convicted in the Municipal Court of the City of Trenton, after joint trial in a "quasi-criminal action" under the New Jersey Disorderly Persons Act, of violating Chapter 2A:170-29 of the New Jersey Statutes. On appeal to the Mercer County Court, and after a trial *de novo*, the Petitioner Callender was again convicted of violating Chapter 2A:170-28 and Chapter 2A:170-29 (2) (b), and each of the remaining petitioners was convicted of violating Chapter 2A:170-29 (2) (b) although they were acquitted of the Chapter 2A:170-28 charge. Each of Petitioners was fined $100 on each count for which he was convicted. On appeal to the Appellate Division, the *Supreme Court, sua sponte,* certified the appeals, prior to argument. The opinion is attached to the Appendix Record.

The City Council of Trenton held a public meeting on the evening of May 5, 1964, for the purpose (among other things) of hearing testimony from interested persons on the John Fitch Way Project, an urban redevelopment plan in a largely Negro area. Highly controversial, the project involved the removal of several hundred poor families, and the erection of middle-income housing in the vacated area priced beyond the ability to pay of those removed. Considerable dissatisfaction with the adequacy of arrangements

for relocating the persons displaced by the project was known to exist as well as the fact that the project would favor white middle class persons over the poor Negro residents of the area. Aware of this distress of a number of interested persons and organizations, including the Congress of Racial Equality (CORE) and the National Association for the Advancement of Colored People (NAACP), the Council called a meeting for May 5, knowing objections would be expressed. Many persons actually attended the meeting for this purpose, including members of CORE and the NAACP. Signs were in evidence and were waved to show support of the various speakers. On a number of occasions many members of the audience vocally and vociferously applauded various speakers (7a, 12a, 24a, 28a, 37a, 41a, 42a, 45a, 48a, 53a, 54a, 57a). Noisy meetings of the City Council were common enough on other occasions (17a).

As the meeting progressed, members of the audience felt that certain Council members, particularly President Walsh, by their comments and questions were harassing some of the speakers and showed a callous lack of sympathy to their predicament. Expressions such as "Let him speak"; "Let him say what he wants." (37a, 42a, 45a, 58a) were heard. There is no evidence that any of Petitioners made any of these remarks. At one point when a speaker, a long time resident of the community, expressing his despair asked, "where shall I go?" received an apparently callous response from Walsh who "didn't know" (37a, 42a, 45a), a substantial murmur broke out. Council President Walsh, the chairman, looked toward Petitioner Callender, a prominent spokesman for CORE and its director of organization. Callender was sitting in an area of the hall where there were obviously a number of members of CORE

and NAACP as well as other persons opposed to the Fitch Way Project, but there was no evidence that Callender had done or was about to do anything. Walsh asked for quiet (4a, 6a). He repeated his "admonition" again looking toward the area where Petitioner Callender was sitting. According to President Walsh's testimony, he stated that "if there were not silence (he) would have to ask them to leave or ask them to be removed by the sergeant-at-arms. And as an immediate reply or retort to that statement (President Walsh) was looking over at Mr. Callender, and Mr. Callender said, 'We have not begun to interrupt your meeting yet,' which (Mr. Walsh) took to be a challenge, a threat, in addition to being a disturbance (,) that more was to come. . . ."

Instead of understanding the clamor he himself created, and trying to calm the meeting down by clarifying whether Callender's choice of words were meant as a threat or not, he acted precipitately and directed the police to "escort" Petitioner Callender from the room. Not having done anything wrong to warrant his eviction, Callender remained in his seat linking arms with the person sitting next to him. Two policemen, Sergeant McDonough and Patrolman Downing, came down and carried Callender out of the meeting room and into the corridor, where they "deposited" him on the floor (4a, 13a, 19a, 20a).

Callender urges that he was instructed to remain in the corridor by the police because he was under arrest by reason of the incidents inside the hearing room. In fact, Callender was arrested and charged on the basis of these incidents inside the Chamber. The New Jersey Supreme Court, however, took the position that Callender was asked to leave by the police, along with the other petitioners,

and, by his silence, refused to go (46 N. J. at 520, 118 A. 2d at 152). While the New Jersey Supreme Court characterized the State's evidence on this point as "firm," *ibid.*, the evidence of the arresting officers, called by the prosecution, is at best confusing and perhaps contradictory. According to Sergeant McDonough, Callender was arrested in the hearing room and carried out under arrest (62a). On the other hand, the other five petitioners were "free" to go, but clearly this did not apply to Callender (61a). Patrolman Downing, the other arresting officer, stated that Callender had not been placed under arrest inside the chamber (22a, 25a, 59a). He testified that he told petitioners "as a group" that they were free to go, but conceded subsequently that he addressed this offer only to the other five petitioners but not to Callender (60a). At all times Officer Downing remained with Callender after he helped to remove him from the chamber.* It is, of course, conceded that one of the charges against Callender, upon which he was arrested and convicted, was that he was "disorderly" within the chamber, prior to his removal, which would appear to contradict the "firm" conclusion of the New Jersey Supreme Court that he was free to go. If he was charged for what he allegedly did in the Chamber, then he was not free to go, and accordingly it is difficult to understand upon what basis the evidence was "firm."

As soon as Callender was carried out of the chamber by the police, the five remaining petitioners also left the chamber. Finding Callender sitting in the hallway with Officer

---

*Petitioners Callender, Smith and Amis testified that Officer Downing went further and prevented Callender from getting up, much less leaving (40-41a, 43a, 55a). Officer Downing denied this (59a), and Sargeant McDonough supported this testimony (61a).

Downing standing over him, they grouped themselves in a rough circle near the place Officer Downing had placed Callender (19a). No dispute exists that they remained there quietly until they were removed by the Police, a short time later, although it is disputed whether or not they were asked to leave the corridor by the police (40a) and by their silence, refused to do so. The Police testified they requested them to leave (23a, 29a).

One Petitioner, Smith, testified that when he approached Callender in the hall and saw him restrained by the police, he said, "Well Herb (Callender), if they're going to take you to jail then I don't think you should go by yourself and I'm going to stay with you" (38a). Petitioner Crittenden testified that as he came out of the hall, he found Callender and several others of the petitioners sitting on the floor and was standing there watching *when one of the officers asked him,* "Are you in or out? After a little thought he decided he was "in" and sat down also (51a). There is no evidence that the incidents that occurred in the corridor outside the hall were part of any preconceived plan (47a), or that they disturbed anyone in the corridor.

While the statute in question speaks in terms of "Interference" or "Obstruction" of persons lawfully in a place (clearly there was no molestation), there was hardly any evidence that the group in the corridor in fact interfered with anyone. The City Council clerk, Stanley Maziarz, testified that he had some problem opening the chamber door because of people sitting outside (5a, 8a, 9a). See also 20a, 22a. It was, however, possible to close the doors (15a, 21a). In evaluating this testimony it should be noted that other persons passed through the doors, without Officer Downing observing that they had any difficulty; nor did

anyone complain to him (22a, 23a, 40a, 43a, 44a, 46a, 47a, 50a, 51a, 52a, 55a, 56a, 60a).

The Mercer County Court, on the above evidence, convicted Callender for disorderly conduct inside the chamber (in violation of Section 2A:170-29 of the New Jersey Statutes) on the basis of his conduct after he was asked to leave by the Chairman and the police (63a). It dismissed this charge as to all other petitioners.

As to the alleged violation of Section 2A:170-29, the obstruction or interference charged, the Court conceded that it "wasn't a great deal of uproar . . ." or a "great interference" (64a). The Court expressed its understanding of the "concern of the City Hall, not necessarily entirely what these persons themselves do in a situation such as this but . . . with what other people in the chamber are going to do as a result of what they do. . . ." It then construed "obstruct" as not necessarily "blocking" a door but as equivalent to "hindering" and found that all of the petitioners, by sitting in the hall, "obstructed" and "interfered" in violation of the statute (64a). It should be pointed out that the first definition in almost all dictionaries of "obstruct" is to "block-up."

The New Jersey Supreme Court affirmed the convictions, and accepted the definition given "obstruct" by the County Court. "It does not matter that persons managed to get by or that none was delayed for anything beyond a minute" (46 N. J. at 520). The Supreme Court apparently misread the record since in this connection it said:

> "the Constitution does not accord to all who disagree with the order of the presiding officer, a right to stretch

out across the entrance to the forum" (46 N. J. at 521-522).

No evidence of stretching across the entire entrance to the chamber is in the record. Even Maziarz did not claim that.

With respect to the charges against Callender arising out of the occurrences within the chamber attendant upon his removal, it rejected Callender's argument that:

1. As applied, the statute violated Callender's rights under the First Amendment, made applicable to the States by the Fourteenth Amendment, to protest the callous attitude of the chairman as well as the housing program itself.

2. Callender had a right not to remove himself voluntarily in order to challenge the validity of the President's order that he be removed since he had done nothing to warrant removal. His own callousness causing considerable dissent cannot be the prop upon which President Walsh may arbitrarily exercise police authority. In this regard it should be noted that the Supreme Court said that "... the more fundamental answer is that the decision of the presiding officer cannot be tested by physical resistance. The remedy, if there is one, must lie elsewhere" (46 N. J. at 517).

Petitioners urge that this is an incorrect statement of the law. *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965). The Supreme Court of New Jersey thus supports a proposition that one must obey the police order regardless of how illegal that

order. This was not a legislative meeting requiring silence from spectators, but a public meeting: nor was it a court session; it is pure emotionalism, not legal reasoning to compare a disputatious gathering to a court hearing. It must be noted also, that the Court's use of the term "physical resistance" (46 N. J. at 517) in light of what actually happened is open to question. Callender resisted no one, he merely refused to cooperate in an illegal arrest.

3. The statute could not be applied to reach wholly passive conduct, *viz.*, failing to cooperate with the police who were removing him against his will, and, as he believed, improperly.

4. The removal order was in fact invalid, the statute applying as it did to quiet meetings, not disputatious meetings.

5. The statute was void for vagueness when applied to this meeting since there was no showing that Callender had disturbed this meeting. At most there was a showing that Callender had "disturbed" Walsh who had disturbed the meeting, and an arrest for such a reason is contrary to previous intepretations of the statute and denies due process.

6. As to the charges against all the petitioners arising out of the incidents outside the chamber, the Court, as already noted, rejected (on grounds of credibility) Callender's contention that he was compelled to remain by the police, and then rejected petitioners' arguments that:

   (1) The statute did not reach their conduct since they neither obstructed nor interfered with anyone, and was therefore unconstitutionally vague as applied; and

(2) The statute on its face and as applied interfered with their constitutional right to express their grievances in a peaceful manner, not merely in the manner prescribed by the City Council.

Reasons for Granting the Writ

I.

Let us first consider what took place inside the City Council chamber since it precipitated all other activities.

The New Jersey Supreme Court treated this aspect of the case as one involving the rights of a public body to control a heckler and preserve order. In so doing, we submit, it missed the legal and constitutional point and misconceived the evidence. No evidence exists that Petitioner Callender was a "heckler" up to the moment Council President Walsh singled him and his companions out.

To participate, as a member of the audience in a disputatious public hearing, and by his presence, to support the position which he, and almost all other members of the audience, took on an important public issue, concerning the welfare of poor resident families about to be removed was all Callender sought.

The role of an audience at a public hearing, particularly at the local government level, is far more than that of auditors. Expressing their position, their interest, even attempting to persuade public officials, is the role of the audience at such a meeting by the act of being present. Most local governments accept and even welcome this participation as an index of the feelings of their electorate and as a constructive outlet for those feelings.

The witnesses in this case recognized this. The public hearing on the Fitch Way Project was not customary but was called because of the fact that it was known to be controversial and to have aroused strong objections (12a). One witness described the atmosphere in the chamber as "electric" (48a). That strong feeling existed because the charge that "urban renewal means Negro removal" seemed evident here.

The central question in this case is whether and to what degree the public officials at such a meeting may exercise police control over this right to be present, and by being present, to express a judgment contrary to that of the presiding official. No one stopped Walsh from heckling witnesses unpleasantly; it appears humorous to raise the question. Presumably that was his right. Under the guise of keeping order, however, how far may he use the police power to discourage speech and remove opposition?

The evidence is clear that after inviting the hubbub by his callous remarks, President Walsh further brought on this incident when he singled out those who opposed his view and told them to keep quiet or leave. Although there is no evidence that Petitioner Callender said or did anything when, rightly or wrongly, considering the remark to be directed at him, he defended himself. He was for no more improperly ordered to leave and physically removed. We submit that there was no reason for this order sufficient to override Callender's right to be present in the assembly to protest action contemplated by the Council harmful to the Negro residents of the area.

The Chairman, and the Court, defended his conduct on the grounds of concern about what *might* happen next, but

in fact nothing did happen. This was so in spite of the fact that in the process of "restoring order" by forcibly removing Callender, the public officials themselves engaged in conduct far more disorderly and more likely to incite a disturbance than Callender's reply, and also precipitated the incident in the first place. To permit a public official to exercise arbitrary police power in order to suppress vocal opposition he himself has created is hardly conducive to respect for law.

This right of a member of the audience to be present and to participate is, we submit, the central question in this case, and which has never been directly passed upon by this Court.

Raising this issue in a slightly different form, the Supreme Court of New Jersey recognized the importance of this question:

> "... But the more fundamental answer is that the decision of the presiding officer cannot be tested by physical resistance. The remedy, *if there is one,* must lie elsewhere" (46 N. J. at 517). (Italics supplied.)

As can be seen, the Court has doubts as to whether there is any right to test an illegal police order. We submit that the first and foremost place is at the place it occurs. The Supreme Court suggests no other place, and it would be hard to find one.

In the context of this case, this question necessarily involves also the constitutionality of the application to Callender's conduct of a typically vague and indefinite "disorderly conduct" statute which, we submit, fails sufficiently to define as unlawful Callender's conduct or to respect the

limitations upon "disorderly conduct" statutes required to meet free speech rights as this Court wrote in *Cox* v. *Louisiana*, 379 U. S. 536, 85 S. Ct. 453 (1965); cf. *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Brown* v. *Louisiana*, *supra*.

In addition, we raise the question of whether a statute on its face applicable to a clearly defined type of situation, the quiet of churches, libraries, etc. can constitutionally be used to arrest and convict someone at a public gathering of an entirely different character, at which debate and argument are of the very essence of the meeting. Is not the application of such a statute to this situation a violation of due process of law? If, as the Supreme Court of New Jersey has determined, this statute governs the meeting under question, then we urge that the statute does not set standards of guilt reasonably understandable to all persons. *Winters* v. *New York*, 333 U. S. 507 (1948). This is particularly true where previous interpretations of the statute and its antecedents indicate that it would not be applicable. Cf. *Hughes* v. *City of East Orange*, 29 N. J. L. J. 343 (1906); *Handlin* v. *State*, 16 N. J. L. 96 (1837). Compare *Mullen* v. *State of New Jersey*, 67 N. J. L. 451 (1902) in which the court said (at 453):

> "If all who are loud and persistent in soliciting support for their candidates or views at public elections or school meetings are to be held disorderly persons, it will lead to a new view as to who are disorderly persons."

In this regard it should be noted, in trying to meet this argument the Supreme Court of New Jersey stated:

> "Indeed, if 'including' had that effect, the specifics would likely exhaust the general words since it is dif-

ficult to think of a place which is like, but is not, a school or a church or a library or a reading room" 46 N. J. at 515.

To this we need merely add, as further examples that are like the examples in the statute, museums, hospitals, mortuaries, nursing homes and concert halls. More importantly we may add court and legislative sessions in so far as spectators are concerned. All of these are further examples of places of public assembly where quiet is required. It is stretching credulity to believe, in light of the history of this statute, that any situation, other than a quiet one, was intended to be governed. The so-called 1952 broadening by the legislature intended to cover others of a like nature, such as we have shown, did not open a whole new category of criminal acts, without even giving an example of what it had in mind.

II.

The conviction of the petitioners for their conduct *outside* the chamber raises slightly different questions. It was, of course, fundamental that Callender, himself, could not be convicted for disorderly conduct outside the chamber if, as he and several witnesses testified, he was sitting in the hallway where he had been placed and kept by police officers. The New Jersey Supreme Court felt no obligation to pass on this point because it found the State's evidence on this point "firm" that Callender was told he was free to go.

But this cannot end the inquiry. While the defendants' proof was consistent that Callender was prevented from going, the evidence of the two arresting officers was flatly inconsistent. One testified that he considered Callender

under arrest when he removed him from the chamber; the second thought he was arrested later, but conceded, when he was recalled, that he omitted Callender when he told the other petitioners they were free to go. On this state of the evidence, we submit, it was a violation of due process to convict Callender as a "disorderly person."

But there is a more fundamental problem with the convictions on this charge against all of the petitioners. Whether Callender remained in the corridor voluntarily or not, the evidence is clear that petitioners sat down, in the corridor of the City Hall to which they had come on proper business and where they had a perfect right to go and be, to exercise peacefully the right to protest Callender's eviction from the chamber; their conduct was at all times quiet and peaceful. They interfered with no one's access to the chamber or at worst created minimal inconvenience as the *de novo* trial judge clearly acknowledged (64a). At most, they acted in a manner displeasing to the police. This cannot constitutionally be the basis for a conviction hereunder. No crowd collected, no riot or breach of the peace was threatened. All was so casual and peaceful at this time that one of the petitioners joined the sitters on the off-hand suggestion of a policeman. No evidence exists that anyone was disturbed. To convict petitioners on this evidence, for violation of a disorderly conduct statute which prohibits obstruction or interference with persons lawfully present in a place, is, we submit, precisely the same misuse and blanket application of a disorderly conduct statute beyond its fair intendment and in breach of constitutional rights as this Court has frequently condemned. Cf. *Edward* v. *South Carolina, supra; Cox* v. *Louisiana,* 379 U. S. 536 (1965).

In addition, we urge that on its face the words of the statute reflect an additional violation of due process of law. The three operative words are "obstructs, molests or interferes . . . " [No question of molestation arises and that may be disregarded.] But the first meaning of "obstruct" is "block-up" in all major dictionaries. No evidence of blocking-up exists as the trial judge acknowledges. He chose to say "obstruct" does not mean "block". "Interfere" means to "hinder". We suggest that such a statute is unconstitutionally vague. "Obstruct" and "interfere", although concerned with the same kind of conduct, have somewhat different meanings. Every obstruction is presumably an interference, but it can hardly be said that every "interference" is an "obstruction".

For its part, the trial court confused the matter further by saying the acts were not a "great interference". How something less than a "great interference" can constitute an obstruction is hard to understand. No reasonable standard exists as to when "obstruct" applies and when "interfere" is the prevailing word. What the New Jersey Court has done is to change the legislative will by writing out "obstruct". Whatever the New Jersey legislature meant by "obstruct" it cannot be eliminated in order to simplify the process of convicting the petitioners. Such procedure does not meet proper constitutional standards.

CONCLUSION

For all these reasons Petitioners respectfully urge that this petition for a writ of Certiorari be granted.

Respectfully submitted,

CARL RACHLIN,
ALBERT X. BADER,
DAVID I. FOX,
Attorneys for Petitioners.

Of Counsel:

GEORGE SCHIFFER,
STEPHEN M. NAGLER,
MARVIN KARPATKIN,
FLOYD MCKISSICK,
ROBERT COLLINS,
NILS DOUGLAS,
LOLIS E. ELIE,
ERNEST FINNEY,
JOHN D. DUE.

BLANK

PAGE

APPENDIX

Opinion of Weintraub, *C.J.*

SUPREME COURT OF NEW JERSEY

A-69 September Term 1965

THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

—v.—

LOUIS S. SMITH, HERBERT E. CALLENDER, MARVA L. AMIS, LILY R. LEWIS, WILLARD D. CRITTENDON, JOYCE L. SCHURIC,

Defendants-Appellants.

Argued December 21, 1965—Decided

Mr. Carl Rachlin, of the New York bar, argued the cause for appellants (*Mr. Stephen M. Nagler* and *Mr. George Schiffer,* of counsel; *Mr. David I. Fox,* attorney).

Mr. Edward J. Phelan, Assistant Prosecutor, argued the cause for respondent (*Mr. Vincent Panaro,* Mercer County Prosecutor, attorney).

The opinion of the Court was delivered by

WEINTRAUB, *C.J.*

The six defendants were convicted in the Municipal Court of the City of Trenton of violating two sections of

the Disorderly Persons Act. On a trial *de novo* in the Mercer County Court, defendant Callender was again convicted on both counts and fined $100 as to each. The remaining defendants were found guilty of only one of the two charges and each was fined $100. We certified defendants' appeals before argument in the Appellate Division.

The setting of these offenses was a public meeting of the governing body of the City of Trenton held at the council chamber and called to consider an urban redevelopment program. While a citizen was speaking against the proposal, there was a disturbance in the area in which defendant Callender was seated. This was the second such distraction from that direction. The president of the City Council called for quiet so that speakers might be heard and warned "that if there were not silence we would have to ask them to leave or ask them to be removed by the sergeant-at-arms." According to the State's proof, Callender retorted "We haven't started to disrupt your meeting yet," or "We have not begun to interrupt your meeting yet." According to the defense, he said "We haven't done anything yet." These versions really differ very little since under each the word "yet" could carry the promise or threat that the disturbances would be repeated and in greater volume. So understanding Callender, the president of the Council directed a police officer to escort him from the room.

The disturbance just described was not the basis of the conviction. Rather the basis was Callender's resistance to the efforts to remove him. He locked arms with someone seated next to him and went limp. Two police officers, in the words of a witness, "had a little problem in lifting him because he's a pretty big boy," and "As they got him out of the seat he sort of fell to the floor or slid to the floor and

just laid there for a moment or two, or maybe ten or fifteen seconds, and then one officer took him by his feet and the other took him by his arms and they sort of half dragged and half carried him out of the meeting chamber and deposited him in the corridor or the entrance into the chamber." While Callender was thus being removed, persons near him chanted "Freedom." The president of the Council asked the speaker then on the floor to talk more loudly to overcome the distraction and according to one witness the speaker in fact said nothing during the commotion. Upon those facts the county court found Callender guilty of violating N. J. S. A. 2A:170-28 which reads:

> "Any person who by noisy or disorderly conduct disturbs or interferes with the quiet or good order of any place of assembly, public or private, including schools, churches, libraries and reading rooms, is a disorderly person."

As stated above, Callender was carried into the corridor just beyond the door to the chamber, and still limp, he was lowered to the floor. Callender stretched out his legs, and the five codefendants seated themselves on the floor in a semicircle, arms and legs interlocked or intertwined. We gather they were carried away before the public meeting ended. Out of this setting stemmed the conviction of all defendants under N. J. S. A. 2A:170-29 which denounces as a disorderly person:

> "Any person who in any place, public or private, * * *
>
> b. Obstructs, molests or interferes with any person lawfully therein; * * *".

The factual picture will be enlarged below.

I.

Defendant Callender contends his conviction under N. J. S. A. 2A:170-28 is against the weight of the evidence. We see no basis to interfere with the trial court's findings. The testimony well warranted a finding that Callender's resistance to the efforts to remove him from the chamber was disorderly, and that that conduct, with the noise necessarily generated by the mode of removal to which Callender put the police officers, did disturb the quiet and good order within the chamber.

Callender's point seems to be that his conduct could not be found to disturb or interfere with the quiet or good order of the meeting because he was "wholly passive." It toys with words thus to describe his behavior. Rather he resisted removal in affirmative terms, both in locking arms with another and in confronting the officers with his dead weight. And it is idle to say, as does defendant, that "the crucial element of intention to disturb is consequently totally lacking." The normal inference is that he intended precisely what he accomplished.

Defendant says the statute does not apply because the phrase "place of assembly, public or private, including schools, churches, libraries, and reading rooms" does not include the public meeting room of a city council. He contends the word "including" limits "place of assembly" to places which are like a school or a church or a library or a reading room, and says the council chamber resembles none of them.

Prior to the adoption of this provision by the revision of Title 2, effective January 1, 1952, the disorderly persons statute spoke specifically of, and only of, "a public school," R. S. 2:202-12; a place of worship, R. S. 2:210-1;

and "a public library or reading room," R. S. 2:202-11. The revision of 1952 deliberately expanded the area of protection to "any place of assembly," whether "public or private." The specification after the word "including" was not intended to restrain the general words preceding it. See generally *Cuna* v. *Board of Fire Com'rs of Avenel*, 42 N. J. 292, 304-05 (1964). Indeed, if "including" had that effect, the specifics would likely exhaust the general words since it is difficult to think of a place which is like, but is not, a school or a church or a library or a reading room. Rather the draftsman specified those four places to avoid any question as to whether they continued to be protected and perhaps also to make it clear that, whereas under the prior statutes the protected schools, libraries and reading rooms were "public" ones, the revision protected "private" ones as well.

Nor can we distill from the places thus specified some characteristic levels of noise and other conduct, and use those levels as an index of places covered by the statute. For one thing, to read the statute to mean that it applies only to a place of assembly wherein the tolerable noise level and tolerable behavior are those expected in a school or a church or a library or a reading room would probably render the general words too vague to survive a constitutional challenge as to them under the due process clause. In any event we see no reason to deny to "any place of assembly, public or private" the natural meaning of those words. Surely, to come to the facts of this case, it should surprise no one that misbehavior disruptive of a hearing before a city council runs afoul of some punitive law, and surely a man of modest understanding, had he consulted the statute in advance of the meeting, would not doubt that it covered the place and the occasion.

Next, defendant addresses sundry constitutional attacks upon the statute and upon its application to his conduct. We see no substance in any of them.

Running throughout defendant's position is the claim that his behavior was protected by the First Amendment to the United States Constitution, for which he cites *Garner* v. *Louisiana,* 368 U. S. 167, 7 L. ed. 2d 207 (1961); *Edwards* v. *South Carolina,* 372 U. S. 229, 9 L. ed. 2d 697 (1963); *Henry* v. *Rock Hill,* 376 U. S. 776, 12 L. ed. 2d 79 (1964); *Cox* v. *Louisiana,* 379 U. S. 536, 13 L. ed. 2d 471 (1965); and *Cox* v. *Louisiana,* 379 U. S. 559, 13 L. ed. 2d 487 (1965). Those cases involved peaceful protests against discrimination because of race, the settings being private places of public service such as lunch counters or public places such as a street or an area in front of a city hall. None remotely resembles the case before us.

Here there was no denial of an opportunity to protest. On the contrary the meeting was called to the very end of permitting all to have their say, for or against the urban redevelopment proposal. Callender was not denied a chance to be heard. Rather he was denied a right he seemingly claimed, to interfere with the right of others to hear and be heard. He was not ordered removed because he expressed views which displeased the presiding officer. He was ordered out because, in response to the president's call for quiet, he threatened even greater disruption of this public meeting. Whether the forum be the courtroom or the chamber of the legislature itself or of a political subdivision of the State, there must be order. It is frivolous to suggest the First Amendment stands in the way of that imperative.

Nor is there substance to Callender's proposition that he had a right to resist removal from the chamber in order to test the validity of the order that he leave. In fact, if such a right were recognized, it would not aid him since the record amply justifies the belief of the president of the Council that defendant intended to interfere with the good order of the hearing. But the more fundamental answer is that the decision of the presiding officer cannot be tested by physical resistance. The remedy, if there is one, must lie elsewhere. Government could not govern if its vital processes could thus be brought to halt. Again, no court would tolerate such interference with its proceedings; the need is the same in the legislative chamber, at the State and at the local level. The chair must have the power to suppress a disturbance or the threat of one, and the power to quell a disturbance would be empty if its exercise could be met by still another disturbance designed to test the officer's judgment.

Although, as we have said, none of the cases cited above factually touch the situation before us, it is plain that *Cox* v. *Louisiana* rejects the notion that lawlessness may pass in the garb of a constitutional guarantee. The majority opinion reminds us (379 U. S. at 554; 13 L. ed. 2d at 484):

> "From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in

the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations. * * *

We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. * * * We reaffirm the statement of the Court in Giboney v. Empire Storage & Ice Co., supra, 336 U. S. at 502, 93 L. ed. at 843, that 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced,

or carried out by means of language, either spoken, written, or printed.'"

Finally defendant says the statute is void for vagueness because it does not spell out the degree of noise or the details of a disorder which will offend. Of course, the statute does not do so in specific terms, and it may be doubted that the ingenuity of man could meet that demand if the Constitution made it. But the Constitution does not insist upon the impossible. It asks only what the subject will reasonably permit, and hence if there is a public interest in need of protection, due process does not stand in the way merely because the subject defies minute prescription.

The basic principle is that a statute is bad if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 70 L. ed. 322, 328 (1926). As that case points out, the subject matter itself may give adequate content to words which, considered alone, may seem forbiddenly obscure. Moreover, if the subject is such that greater specificity is not feasible, we must remember, as was said in *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340, 96 L. ed. 367, 371 (1952), that:

"* * *But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently,

> no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

Hence it would not necessarily "be fatal if incongruities or problems of construction should develop in fringe areas." *State* v. *Monteleone*, 36 N. J. 93, 98 (1961). In such circumstances, the courts can see to it that a statute is not applied beyond a fair understanding of the legislative intent.

The statute before us meets the constitutional demand. It speaks of "noisy or disorderly conduct" which "disturbs or interferes with the quiet or good order" of "any place of assembly, public or private." Surely, a man of ordinary intelligence knows the council chamber at the time of a public hearing is a public "place of assembly." So, too, such a man knows the "quiet or good order" of a place depends upon the nature and the purpose and the needs of the meeting. He also knows a legislative chamber from a barroom or a ball park and knows what kind of behavior comports with each.

Hence the statute is valid on its face. It is also valid as applied in this case. For a man to refuse to leave upon the order of the president of the Council, to resist removal by locking arms with another and requiring two officers to carry and drag him from the chamber, is clearly foreign to the nature and purpose of the assembly, and the actor should not be surprised by a decision that his conduct was "disorderly" and did disturb and interfere with both the "quiet" and "the good order" of that meeting.

II.

All defendants contend their convictions under N. J. S. A. 2A:170-29 for obstructing or interfering with persons lawfully in a public place, were against the weight of the evidence. We are satisfied they were not.

The testimony was conflicting. For the State the testimony showed a double door, each section three feet in width, separated the corridor from the council chamber; that defendants so arranged themselves that one door could not be opened at all; and that while the other could be opened partially, a person could pass only with difficulty, either by stepping over defendants or squeezing around them. Defendants testified that the few persons who passed did so easily. Callender added a claim that when he attempted to rise, a police officer prevented him, while the State's testimony was firm that both Callender, notwithstanding his behavior in the council chamber, and the other defendants were asked to leave but declined so much as to answer. The issue was one of credibility, and since the County Court had the advantage of seeing and hearing the witnesses, we should not reject findings which are well supported in the written record.

It does not matter that persons managed to get by or that none was delayed for anything beyond a minute. The statute does not require that the obstruction or interference be complete or enduring. The word "obstruct" includes hindering, *State* v. *Furino*, 85 N. J. Super. 345, 348 (App. Div. 1964), and of course "interfere" does not require a total frustration. It is enough that defendants immobilized themselves at a place designed for passage, and did so for the purpose, as their attitude of immobility strongly suggested, and with the effect of making it difficult for

others to use the corridor in going in and out of the council chamber.

Defendants cannot find help in *People* v. *Nixson,* 248 N. Y. 182, 161 N. E. 463 (Ct. App. 1928), where, as the court said, "The sole question is whether a number of pedestrians walking, quietly, four abreast, on the sidewalk, creating no excitement, or disturbance, may without warning by the police be arrested for disorderly conduct and sentenced to a term of imprisonment" (161 N. E. at 466). Indeed the court there affirmed the conviction in four cases in which the defendants failed to heed the warning of the police to cease marching in large groups where the police feared the possibility of disorder (161 N. E. at 466). In the case on hand, defendants were not merely standing in the corridor with no intent to block it. Rather defendants intentionally obstructed the passageway, assuming positions of immobility from which those who would want to pass would know defendants would not budge.

Defendants further urge that despite the unity of action and purpose with which they arranged themselves on the floor, the guilt of each must be judged severally upon an inquiry as to whether he or she alone obstructed or interfered with passage. The proposition is frivolous.

Defendants say the statute is invalid on its face because it does not require proof of a breach of the peace. We do not understand the police power to be so limited. In any event the statute proscribes conduct which holds the promise of a disorder of that kind, and we have no doubt the State may deal with it punitively on that account.

Finally defendants say the statute is invalid as applied to the facts of this case. That contention largely depends upon factual assertions which the trial court did not be-

lieve. Beyond that, defendants seem to be repeating the broad proposition we rejected in "I" above, that they have a constitutional right to express their grievances in the way they think meet, here by sitting at a place intended for walking and to do so in a manner which interferes with others who want to pass. The right to protest does not include a right to disregard statutes reasonably designed to protect the rights of all. If the grievance at that point was, as it seems, the removal of Callender from the council chamber, surely the Constitution does not accord to all who disagree with the order of the presiding officer, a right to stretch out across the entrance to the forum.

The judgments are affirmed.

Mandate on Affirmance

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 4902

Criminal Action on Appeal

STATE OF NEW JERSEY,

Plaintiff-Respondent,

—v.—

LOUIS S. SMITH, *et als.,*

Defendants-Appellants.

This cause having been duly argued before this Court by Mr. Carl Rachlin, counsel for the appellant and Mr. Edward J. Phelan, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Mercer County Court is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Mercer County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the 21st day of March, 1966.

JOHN H. GILDEA
Clerk of the Supreme Court

FILED
MAR 21 1966
JOHN H. GILDEA
Clerk

A TRUE COPY
JOHN H. GILDEA
Clerk